SUPREME COURT, U. S.

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In the

Supreme Court of the United States

October Term, 1966

No. 1000

PACIFIC INLAND NAVIGATION COMPANY,
a corporation,
Petitioners,

v.

DELBERT A. COURSE,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

	PAGE
Question Presented	1
Statement of Case	2
Argument for Denying the Writ	2
1. There is no basic conflict in the interpretation of Reed v. S.S. Yaka, 373 U.S. 410	2
2. Reed v. S.S. Yaka, 373 U.S. 410, permits this action against the vessel owner-employer	5
3. Reed v. S.S. Yaka, 373 U.S. 410, is indistinguishable	9
4. The importance of the question is nil	11
Conclusion	12
Appendix A—Opinion of Court of Appeals	13

AUTHORITIES

TABLE OF CASES

	PAGE
Biggs v. Norfolk Dredging Co., 360 F.2d 360, 237 F. Supp. 590	3
Carroll v. S.S. Santa Rose, 1966 Am.Mar.Cas. 2051	5
Grace Line, & S.S. Santa Juana, v. Kanton Civil No. —	2
Hertel v. American Export Lines, 225 F. Supp. 703	4, 10
Italia Soc. v. Oregon Stevedore Co., 376 U.S. 315	8
Johansen v. United States, 343 U.S. 427	11
Martini v. United States, 192 F.2d 649	7
Peros v. Grace Line, Inc., 1966 Am.Mar.Cas. 1316	5
Pope & Talbot, Inc. v. Hawn, 346 U.S. 406	7, 11
Reed v. S.S. Yaka, 373 U.S. 410	2, 3, 4, 5, 6, 8, 9
Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124	7
The Tungas v. Skogaard, 358 U.S. 588	11
Santiago v. Hermands, 255 F. Supp. 932	5
Seas Shipping Co. v. Sieracki, 328, U.S. 85	6

STATUTES

33 U.S.C. §905	5

RULES OF CIVIL PROCEDURE

Rule 19, Federal Rules of Civil Procedure	12

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PACIFIC INLAND NAVIGATION COMPANY, a corporation,
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BRIEF OF RESPONDENT IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent prays that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on October 26, 1966, be denied.

QUESTION PRESENTED

Can a ship repairman maintain an action against a ship owner, who is also his employer, for injuries resulting from an unseaworthy vessel?

STATEMENT OF THE CASE

A libel *in personam* was filed against petitioner for injuries due to the unseaworthiness of the tug *Bannock*. Negligence was also alleged initially, but was stricken by the District Court and not reinstated by the Court of Appeals (See Appendix A, Footnote 1) so this question is not involved in this petition.

Respondent was employed as a ship repairman—marine electrician by petitioner and in the course of his employment worked on various of petitioner's vessels, including the tug *Bannock*. Petitioner appealed from a decree entered in favor of respondent in the District Court finding the vessel unseaworthy and the Court of Appeals affirmed October 26, 1966 (Appendix A). The right to, and the amount of benefits respondent received pursuant to the Longshoremen's and Harbor Workers' Compensation Act, Title 33 U.S.C. §§ 901, *et seq*, were not in issue at the trial.

ARGUMENT FOR DENYING THE WRIT

1. There is no basic conflict in the interpretation of *Reed v. S. S. Yaka*, 373 U.S. 410 (1963).

A writ of certiorari to this very same Ninth Circuit Court of Appeals was denied January 9, 1967, in the case of *Grace Line, a corporation, and S. S. Santa Juana, petitioners*, v. *Michael J. Kanton, respondent*, involving

the central issue herein raised by this petitioner. In that case also, respondent was employed by petitioner as a longshoreman and was injured through the unseaworthiness of the vessel owned by petitioner. A judgment entered in favor of the injured party in the District Court, based on a libel *in rem*, was appealed to the United States Court of Appeals for the Ninth Circuit, affirmed *per curiam*, and the Petition for Writ of Certiorari subsequently denied by this court.

The courts have had no difficulty in applying the doctrine of *Reed v. S. S. Yaka, supra.* The attempt by Judge Hoffman, in the Eastern District of Virginia, Norfolk Division, to restrict the meaning and interpretation of this decision was quickly reversed in *Biggs v. Norfolk Dredging Company*, 360 F.2d 360 (4 Cir. 1966). The District Court attempted to confine *Reed* v. *S. S. Yaka, supra*, to longshoremen (*Biggs v. Norfolk Dredging Co.*, 237 F. Supp 590, at p 598). Such limitation was immediately struck down by the Court of Appeals, at page 363,

> The determinative factors in Reed v. The S.S. Yaka, supra, 373 U.S. 410, 83 S.Ct. 1349 are present in each case here. The Supreme Court's ruling was this: if an employer is the permanent or pro hac vice owner of the ship on which his employee is injured while working as a longshoreman, then the employee may sue his employer under the general maritime law for damages, notwithstanding that previously the employee has received compensation.

and, at page 364,

> Like reasoning applies to the instant cases. Each plaintiff now pleads himself a seaman, or alternatively as one doing a seaman's job, and thereby entitled to sue for unseaworthiness. See Seas Shipping Co. v. Sieracki, 328 U.S. 85, 99, 66, S.Ct. 872 (1946). It is now elementary that all who do traditional seaman's work are owed, and may sue on, the warranty of seaworthiness. See, e.g., Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953); Ross v. S.S. Zeeland, 240 F.2d 820 (4 Cir. 1957);
>
> Lawlor v. Socony-Vacuum Oil Co., 275 F.2d 599, 84 A.L.R.2d 613 (2 Cir. 1960), cert. den., 363 U.S. 844, 80 S.Ct. 1614, 4 L.Ed.2d 1728. The present plaintiffs may also be armed in like fashion.

and, at page 365,

> * * * that *Yaka* preemptorily dictates, to repeat, that a seaman-employee, actual or *Sieracki*, injured aboard his employer's vessel is to be put in the same position as one injured aboard a ship owned by a third party, and in the latter situation, the employee could recover compensation from his employer and still sue the third party for negligence or unseaworthiness.

Thus, the Court of Appeals for the Fourth Circuit and the Court of Appeals for the Ninth Circuit are in agreement as to the interpretation and application of *Reed v. S.S. Yaka, supra.* The district courts have had no difficulty. *Hertel v. American Export Lines*, 225 F.Supp. 703

(S.D.N.Y. 1964, (an *in personam* action by a longshoreman against the owner *pro hac vice*). See, also, *Peros v. Grace Line, Inc.*, 1966 Am.Mar.Cas. 1316 (S.D.N.Y. 1966); *Carroll* v. *S.S. Santa Rose*, 1966 Am.Mar.Cas. 2051 (S.D.N.Y. 1966); *Santiago v. Hermands*, 255 F.Supp. 932 (Puerto Rico D.C. 1966), all approving actions against the employer-ship owner.

2. *Reed* v. *S.S. Yaka*, 373 U.S. 410 (1963) permits this action against the vessel owner-employer.

Petitioner is asking for the strict and literal interpretation of the Longshoremen's and Harbor Workers' Compensation Act[1] which was rejected in *Reed v. S.S. Yaka, supra*, in the following language, at page 414,

> Pan-Atlantic relies simply upon the literal wording of the statute, and it must be admitted that the statute, on its face, lends support to Pan-Atlantic's construction. But we cannot now consider the wording of the statute alone. We must view it in the light of our prior cases in this area like *Sieracki*, *Ryan*, and others, the holdings of which have been left unchanged by Congress.

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1. 33 U.S.C. §905 Exclusiveness of Liability. Sec. 905. The liability of an employer prescribed in Sec. 904 shall be exclusive and in place of all other liability of such employer to employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Chapter, or to maintain an action at law, or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

For the petitioner who possesses two hats, one denoting an employer, the other representing ownership and operation of a ship, this court spoke with unmistakable clarity, at page 414,

> In the light of this whole body of law, statutory and decisional, only blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan-Atlantic was not only an employer of longshoremen, but was also a bareboat charterer and operator of a ship, and, as such, was charged with the traditional, absolute, and non-delegable obligation of seaworthiness which it should not be permitted to avoid.

Reed v. S.S. Yaka, *supra*, forms the logical and symmetrical union between two growing lines of decisions. On the one hand, commencing with *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, the warranty of seaworthiness was extended to an injured party not a member of the crew. In the face of arguments that seaworthiness arose out of the contractual relationship between the ship owner and the seaman, and that the Longshoremen's and Harbor Workers' Compensation Act was a bar to this action against the ship owner, the Supreme Court held that a stevedore, employed by a stevedoring company, could recover against the vessel owner for the unseaworthiness of the vessel. Following this decision, some courts, particularly in the Second Circuit, attempted, by one means or another, to limit this exten-

sion to stevedores and not include other shoreside personnel who were doing ship's service. See, for example, *Martini v. United States*, 192 F.2d 649 (1951 C.A.2N.Y.) This narrow interpretation was given its proper interment in the case of *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, involving a carpenter who came aboard the ship to do minor repairs and was injured when he fell through an open hatch. This court said, at page 413,

> *Sieracki's* legal protection was not based on the name "stevedore," but on the type of work he did and his relationship to the ship and to the historic doctrine of unseaworthiness. * * * His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship, or of seamen who had been or were about to go on a voyage. All were subjected to the same danger, all were entitled to like treatment under law.

Concurrently with this broad concept of extending the protection of seaworthiness to all shoreside workers, injured while doing work traditionally performed by seamen, there developed a concept of indemnity by the employer to the ship owner, if the cause of the accident was due to the action, or inaction, of the employer. *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, involved an injury due to unsafe storage of cargo, wherein the original plaintiff obtained judgment against the ship owner, even though he had received

benefits under the Longshoremen's Act. It was held that the stevedoring company would be responsible to indemnify the ship owner for such loss, even though the result would be that the employer would then be buying compensation insurance, and, in addition thereto, be paying additional sums to ship owners. In *Italia Soc. v. Oregon Stevedore Co.*, 376 U.S. 315 (1963), the duty of indemnification was found to exist, even though there was no negligence on the part of the stevedore-contractor. The intent of *Sieracki* was to indemnify those injured due to unseaworthiness while engaged in the ship's service. The intent of *Ryan* is to place the burden, ultimately, on the company whose default caused the injury. When the ship owner and employer are the same person, performing two separate functions, this court spoke with clarity in *Reed v. S.S. Yaka, supra,* at page 414,

> Yet the Court of Appeals held, and Pan-Atlantic would have us hold, that petitioner must be completely denied the traditional and basic protection of the warranty of seaworthiness simply because Pan-Atlantic was not only the owner *pro hac vice* of the ship, but was also petitioner's employer. In making this argument, Pan-Atlantic has not pointed, and could not point, to any economic difference between giving relief in this case, where the owner acted as his own stevedore, and in one in which the owner hires an independent company. In either case, under *Ryan*, the burden ultimately falls on the company whose default caused the injury.

3. *Reed v. S.S. Yaka, supra,* is indistinguishable.

Petitioner attempts to distinguish *Reed v. S.S. Yaka, supra,* on the ground that it was a third party case. Such was not the way this court approached the problem. The employer was the bareboat charterer and was treated by this court as the owner (p 412). In addition, this court stated,

> We have no doubt, and indeed Pan-Atlantic admits, that barring express statutory exemption, the bareboat charterer is personally liable for the unseaworthiness of a chartered vessel, and that this liability will support a libel *in rem* against the vessel.

The statutory exemption referred to was the claimed protection of the Longshoremen's Act. Before coming to its decision, the court stated that,

> 'The *only* question is whether the Longshoremen's Act prevents recovery by petitioner for Pan-Atlantic's breach of its warranty of unseaworthiness.

It is hard to be more explicit. The contention that the Longshoremen's Act was a bar to a suit against his own employer was rejected.

Petitioner next contends, without citation of any authorities, that *Reed v. S.S. Yaka, supra,* could not include an action *in personam,* as opposed to an action *in*

rem. The court specifically found personal liability on the owner-employer, which would then support a libel *in rem* against the vessel, at page 412,

> We have no doubt, and indeed Pan-Atlantic admits, that, barring express statutory exemption, the bareboat charterer is personally liable for the unseaworthiness of a chartered vessel, and that this liability will support a libel *in rem* against the vessel.

In other words, without actually deciding that personal liability was necessary to support a libel *in rem*, the court held that in *this case* there was personal liability because the Longshoremen's Act did not bar such personal liability. Personal liability, by definition, permits an *in personam* action, and the right to bring a libel *in rem* need not even be a problem in this case. The attempted distinction was cleanly snipped in *Hertel v. American Lines, Inc., supra*, at page 704,

> The defendant urges that the *Yaka* is to be distinguished because it was an *in rem* action, whereas the instant one is brought on the civil side *in personam*. However, the hard core of the court's decision, based as it is upon personal liability of the bareboat charterer, renders the claimed distinction invalid.

Although not a longshoreman, respondent was in the ship's service in performing a traditionally crew

member's work. To attempt to limit the scope of seaworthy protection to longshoremen would require a reversal of *Pope & Talbot, Inc. v. Hawn, supra,* (involving a carpenter), and of *The Tungas v. Skovgaard,* 358 U.S. 588, (involving a maintenance foreman).

4. The importance of the question is nil.

Petitioner attempts to suggest that *Reed v. S.S. Yaka, supra,* would allow maritime employees of the government to sue the government directly. Actions against the government are possible only where immunity has been waived, and the federal compensation system has previously been held a bar to such actions. *Johansen v. United States,* 343 U.S. 427 (1952).

There is no conflict within the Court of Appeals. Instead, there is uniform agreement as to interpretation of *Reed v. S.S. Yaka, supra.* The holding in this court in *Reed* was pronounced after careful consideration of the economic factors involved. As intended by the decision, the financial burden arising from the unseaworthiness of the vessel now ultimately rests on the party responsible for the condition. This is *not* (1) a matter where a state court has decided a federal question of substance not heretofore decided by this court; (2) a decision of a Court of Appeals in conflict with a decision of another Court of Appeals; (3) a decision concerning a state or territorial question in conflict with state or

territorial law ;(4) a decision on an important question of federal law not heretofore settled by this court; (5) a decision on a federal question in conflict with applicable decisions of this court, or (6) a departure from accepted or usual course of judicial proceedings. (See Rule 19, Supreme Court Rules). Interpretation has been easy and uniform. Certiorari has been previously denied on this same issue from the same circuit. No further clarification of the decision is necessary.

CONCLUSION

For the foregoing reasons, petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PACIFIC INLAND NAVIGATION COMPANY, a corporation,
Appellant,
vs.
DELBERT A. COURSE,
Appellee.
No. 21,080

[October 26, 1966]

On Appeal from the United States District Court for the District of Oregon

Before: MERRILL and KOELSCH, Circuit Judges, and MATHES, District Judge

MERRILL, Circuit Judge:

This appeal presents the question whether a shipowner which operates its own repair yard can be held liable to its employee harbor worker for shipboard injury resulting from unseaworthiness of the vessel.[1] The worker was covered by the Longshoremen's and Harbor Worker's Compensation Act,[2] and appellant contends that §905 of that Act precludes recovery.[3] The

1. This was a libel in personam, grounded on the admiralty jurisdiction of the District Court. 28 U.S.C. §1333(1) (1964).

Libelant first brought an action at law, alleging both unseaworthiness and negligence, grounded upon diversity jurisdiction. Upon Pacific's motion the negligence (Jones Act) claim was dismissed; later the unseaworthiness claim was transferred to admiralty by stipulation. Libelant has cross-appealed the dismissal of his negligence count, on the ground that even if a Jones Act claim will not lie, he can maintain a negligence action on the admiralty side under traditional maritime law, see *Pope & Talbot v. Hawn*, 346 U.S. 406, 413 (1953). Apparently the District Court did not rule on this contention. However, in view of our affirmance of libelant's unseaworthiness claim, we decline to rule either on the District Court's dismissal of the Jones Act claim, or on libelant's argument for a negligence claim in admiralty.

2. 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§901-950 (1964).

3. 33 U.S.C. §905:

"The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, * * * otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *."

District Court held otherwise, relying on *Reed v. The Yaka*, 373 U.S. 410 (1962).

Appellant seeks to distinguish that case, asserting that there the employer, holding a bareboat charter from the shipowner, was obligated under the charter agreement to make the owner whole for damages resulting from an unseaworthy condition caused by the charterer. Appellant thus likens that case to *Ryan Stevedoring Company v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). In *Ryan* the imposition on the employer of the economic burden of its employee's recovery for unseaworthiness was allowed notwithstanding the provisions of §905. This result, however, was justified upon the ground that by its warranty to the shipowner the employer took upon itself not only its own limited obligations to its employee under the Act, but the obligations of the shipowner as well.

In this case, appellant asserts, we do not have the three-party situation which existed in *Ryan* and in *The Yaka*, where the employer's unseaworthiness responsibility was based upon a duty to indemnify the owner. Here it is asserted if there is such responsibility it runs directly to the employee—a result which §905 expressly forbids.

Appellant misreads *The Yaka*. Its construction of the holding is in accord with the views of the District Court in *The Yaka* but is fairly contrary to the reasoning of the Supreme Court. The Supreme Court did not hold the shipowner liable for unseaworthiness. It expressly stated: "We do not reach that question here" (373 U.S. at 411, footnote 1). It held the charterer, as owner *pro hac vice*, to a warranty of seaworthiness running to its employee. The error on which the Court of Appeals was reversed was "in holding Pan-Atlantic [the employer and charterer] could not be held personally liable for the unseaworthiness of the ship which caused petitioner's injury." (373 U.S. at 412). "The only question," the Court stated (at page 412) "is whether the Longshoremen's Act prevents recovery by petitioner

for Pan-Atlantic's breach of its warranty of seaworthiness." It rejected the contention (at page 414) "that petitioner must be completely denied the traditional and basic protection of the warranty of seaworthiness simply because Pan-Atlantic was not only the owner, *pro hac vice*, of the ship but was also petitioner's employer."

Section 905 was, in clearest terms, held not to bar recovery by an employee for a breach of his employer's warranty of seaworthiness.

The District Court did not err in so holding.

Also assigned as error are holdings of the District Court rejecting apepllant's contentions that the vessel on which injury was sustained was at the time a "dead ship"; that appellee was not at the time of injury engaged in seamen's work; that *The Yaka* is distinguishable upon the ground that it dealt with a longshoreman, while appellee was a marine electrician. In none of these do we find merit. The first contention we view essentially as one of fact upon which the court's finding was not clearly erroneous. On the last two contentions we regard *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953) as controlling.

Judgment affirmed.

MATHES, Senior District Judge, concurring specially:

I concur in the result; but do so only because *Reed v. S.S. Yaka*, 373 U.S. 410 (1963), as I understand it, *ex necessitate* reads § 5 out of the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C. § 905], as applied to the case at bar.